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REPORT TO THE COMMITTEE ON RULES, FINANCE
AND INTERGOVERNMENTAL RELATIONS

CITY ATTORNEY ANALYSIS OF PROPOSED BALLOT MEASURES

INTRODUCTION

On October 1, 2003, the Committee on Rules, Finance and Intergovernmental Relations [Rules Committee] of the City Council undertook to review ballot measures for possible placement on the March 2, 2004, ballot. At the hearing, the Affordable Housing Task Force [Task Force] recommended two ballot measures be placed on the March ballot. The first measure would create a business tax for businesses that rent passenger vehicles. The second measure would increase the City's existing real estate transfer tax to \$11. The Rules Committee also heard a proposal by Mr. Mel Shapiro to establish open meetings requirements for City of San Diego ad hoc committees, and a proposal by Mr. Vic Hooker to file a class action lawsuit against gasoline companies respecting their pricing of gasoline in the greater San Diego area. This Report analyzes these ballot proposals.

ANALYSIS

I. Car Rental Tax

The Task Force has recommended developing a flat business tax [Business Tax] on businesses that rent passenger vehicles [Rental Car Agencies] in the City of San Diego [City]. Monies collected from the Business Tax would be used for affordable housing projects.

The City currently imposes a business tax of \$125 per year plus \$5 per employee for businesses with twelve or more employees, and \$34 per year for businesses with fewer than twelve employees. San Diego Municipal Code [SDMC] § 31.0301. The Municipal Code may be amended to create an additional business tax to be imposed on Rental Car Agencies. Provided that the business uses falling within this category to be taxed can be accurately defined and categorized, it is permissible. The courts generally have held that distinguishing between taxpayers with different tax rates does not violate constitutional protections if the distinction rests on a rational basis. *Ladd v. St. Bd. of Equalization*, 31 Cal. App. 3d 35 (1973). For example, when an "entertainment tax" imposed by the City of Los Angeles was challenged, the court held

that the entertainment industry may be properly subdivided and separately classified from other businesses if the classification is founded on natural, intrinsic, or fundamental distinctions which are reasonably related to the object of the legislation. *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170 (1987). The power of legislative bodies to make classifications of persons or property for the purpose of taxation is very broad. *Roth Drug, Inc. v. Johnson*, 13 Cal. App. 2d 720 (1936). "Business taxes are presumed to be rationally based if any conceivable state of facts exists to support them." *City of Berkeley v. Oakland Raiders*, 143 Cal. App. 3d 636, 639 (1983) (citations omitted).

As noted above, the proposed Business Tax would be used for affordable housing projects. As such, it would be a special tax. Article XIII C, section 2(d) of the California Constitution requires a two-thirds vote of the electorate for the imposition, extension, or increase of any special tax.

II. Real Estate Transfer Tax

In addition to the business tax, the Task Force has recommended the sale of \$1 billion in bonds to pay for the construction of City infrastructure improvements. The bonds would be paid for by an increase in the City's real estate transfer tax [Transfer Tax] to \$11.

A Transfer Tax is imposed on property owners upon the successful negotiation of a sale of real property when it can be paid out of the sales price of the real property. California Revenue and Tax Code section 11901 et seq. establishes the procedures by which a county and a city may impose a Transfer Tax and the maximum tax rate. A county may impose a Transfer Tax on documents used to transfer real property within the county when the consideration or value of the property interest conveyed exceeds \$100, at the rate of \$0.55 for each \$500 or fractional part thereof. Cal. Rev. & Tax Code § 11911(a). Once a county imposes the Transfer Tax, a city within the county may also impose the Transfer Tax at the rate of one-half the amount of the county tax. *Id.* at § 11911(b). If the city tax is imposed in conformity with Section 11911(b), city taxpayers are given a credit against the county Transfer Tax for the Transfer Tax paid to the city. *Id.* at § 11911(c).

In accordance with the Revenue and Tax Code, the county collects the Transfer Tax and allocates the proceeds. If a city within the county imposes a tax in conformance with section 11911(b), the city receives one-half of the proceeds of the Transfer Tax the county collects within the corporate area of the city. *Id.* at § 11931. In contrast, if a city within the county does not conform with these provisions and the maximum tax rate, no credit for city taxpayers is permitted and all proceeds of the tax collected are allocated to the county. *Id.* at §§ 11911(c) and 11931(3). A city may, however, impose its own non-conforming Transfer Tax and retain all of the proceeds generated from the tax.

Both San Diego County [County] and the City have adopted Transfer Taxes in accordance with the Revenue and Tax Code. San Diego County Code of Regulatory Ordinances [SDCCRO] § 22.301; SDMC § 37.0101. The County Transfer Tax is \$0.55 per \$500 of value, or

fractional part thereof; the City Transfer Tax is \$0.275 per \$500 of value, or fractional part thereof. SDCCRO § 22.302; SDMC § 37.0102

Once a county and city have adopted a Transfer Tax, the tax rate is effectively established by state statute. As noted above, the City and County have adopted the Transfer Tax in conformance with the tax rate established in the Revenue and Tax Code. If the City now raises its Transfer Tax rate higher than that established in the Revenue and Tax Code to pay for the debt service on bonds issued for the purpose of constructing infrastructure improvements, the increase will cause two unanticipated and undesirable results. First, City taxpayers will no longer receive a credit against the County Transfer Tax for the Transfer Tax paid to the City. Second, the entire amount collected by the County will be allocated entirely to the County. *Id.* at § 11911(c) and 11931(3). As a consequence, in order to achieve the revenue gains anticipated by the proposed Transfer Tax increase, the City would have to raise its Transfer Tax sufficiently to also recapture the revenues lost to the County. Presumably, the \$11 Transfer Tax proposed by the Task Force takes into account the effective loss of revenue and is sufficient to meet the debt service for the proposed infrastructure bonds.

While the courts have recognized that a charter city may impose a Transfer Tax or create its own non-conforming Transfer Tax when the tax is for general purposes, if a Transfer Tax is imposed or created for specific purposes it is prohibited by Article XIII A of the California Constitution. *Fisher v. County of Alameda*, 20 Cal. App. 4th 120 (1993), *Fielder v. City of Los Angeles*, 14 Cal. App. 4th 137 (1993). In the instant proposal, the proposed increase in the Transfer Tax would be used for a specific purpose, namely to pay the debt service on \$1 billion in bonds sold for the construction of infrastructure in the City. A Transfer Tax imposed for such specific purposes is prohibited by the California Constitution.

In the event the City desires to impose some other type of tax to pay the debt service on the bonds, the tax would be considered a special tax. Special taxes require a two-thirds vote of the electorate. Cal. Const. art XIII C, § 2(d).

III. Brown Act/Open Meeting Legislation Proposal Submitted by Mel Shapiro

Mr. Shapiro's proposal reads as follows:

I propose that all meetings of legislative bodies be noticed public meetings unless they are closed sessions permitted under the Brown Act. Specifically, I refer to the loophole in state law for ad-hoc committee meetings, where the committee is less than a quorum. The meetings are not noticed so that the public cannot attend. There are never any minutes kept. There is no way for the public to know who attends the meetings since we do not know where or when the meetings are held.

Mr. Shapiro's proposal refers to an exception in the Brown Act which provides that the requirement of open and public meetings does not apply to "advisory committees, composed

solely of the members of the legislative body that are less than a quorum of the legislative body." Cal. Gov't Code § 54952(b). Under Mr. Shapiro's proposal, this exception would no longer apply to subcommittees of less than a quorum of the members of a City legislative body, and such subcommittees would be required to comply with the open and public meeting requirements of the Brown Act.

The City is not preempted by state law from imposing stricter open and public meeting requirements on its advisory committees than those set forth in the Brown Act. The Brown Act expressly provides that "Notwithstanding any other provision of law, legislative bodies of local agencies may impose requirements upon themselves which allow greater access to their meetings than prescribed by the minimal standards set forth in this chapter." Cal. Gov't Code § 54953.7.

The City Council has the ability to implement Mr. Shapiro's proposal directly, as an alternative to submitting the matter to the voters as a ballot measure. The Council has the authority to impose stricter open meeting requirements on City advisory boards or committees by approving an ordinance or Council Policy, without the time consumption and expense of a ballot measure.

Mr. Shapiro's proposal would not prevent individual members of a legislative body who are less than a quorum, and who are not members of a subcommittee, from meeting in private to discuss business. Therefore, this stricter open meeting requirement might have the practical effect of discouraging the formation of official subcommittees.

IV. Initiation of Litigation Regarding Gasoline Prices/Proposal by Vic Hooker

Mr. Hooker's proposal reads as follows:

The City of San Diego must form a coalition of all cities in the Greater San Diego area then file a class action law suit against the major oil corporations to lower our gas prices to what they are charging for gas in Los Angeles. In the last 15-20 years, Big Oil has been charging San Diegans 15-20 cents more per gallon than in Los Angeles. We are paying some of the highest prices in the United States of America.

This proposal is legally problematic for two reasons. First, it requires the City to form a coalition with other cities in the area to initiate litigation, however, the City has no authority to require other cities to participate in a lawsuit. Second, the subject of this proposal is not a proper subject for an initiative, because the power of initiative is limited to legislative matters and the initiation of litigation by the City is not a legislative matter.

The California Constitution defines an initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art II, § 8. The initiative power is limited to legislative decisions involving the adoption or rejection of statutes. An initiative which proposes to make an administrative decision, adjudicate a dispute, or pass a resolution, is not a proper exercise of the initiative power. *American Federation of Labor*

v. Eu, 36 Cal. 3d 687, 714 (1984). The rationale for this rule is that allowing administrative or executive acts to be carried out by initiative would be harmful to the efficient administration of city business. *Lincoln Property Co. No. 41 Inc. v. Law*, 45 Cal. App. 3d 230, 233-34 (1975).

A legislative act is one which formulates a rule to be applied to all future cases. *Strumsky v. San Diego County Employee's Retirement Association*, 11 Cal. 3d 28, 35 (1974). The instant proposal does not set a general rule to apply to all future cases. Instead, it involves an administrative decision to initiate a lawsuit against private oil companies based on a specific set of existing facts. As such, it is not a legislative proposal, and is not the proper subject for a ballot measure.

CONCLUSION

In summary, the Municipal Code may be amended to add a separate category for Rental Car Agencies for imposition of a Business Tax. A two-thirds vote of the electorate would be required for the imposition of the tax. Although the City may increase its Transfer Tax, the monies derived from the Transfer Tax may only be used for general governmental purposes and cannot be used to pay the debt service on bonds issued for construction of public infrastructure improvements. The City may implement stricter open and public meetings requirements for its advisory committees; however, such restrictions may have the practical effect of discouraging formation of official subcommittees. Finally, the proposal to file a class action lawsuit against gasoline companies is not a proper subject for a ballot measure because it is not a legislative proposal.

Respectfully submitted,

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